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 UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT
 12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,) CR No. 10-600-R
)
14 Plaintiff,) <u>GOVERNMENT'S SENTENCING</u>
) <u>POSITION FOR DEFENDANT</u>
15 v.) <u>JUAN BANALES VENEGAS</u>
)
16 JUAN BANALES VENEGAS,) Date: March 14, 2011
) Time: 1:30 p.m.
17 Defendant.)
)
)

20 I. PRESENTENCE REPORT AND SENTENCING RECOMMENDATION

21 The government concurs in the factual findings and advisory
 22 Sentencing Guidelines calculations in the Revised Presentence
 23 Report ("PSR") disclosed on February 7, 2011, with the exception
 24 of PSR ¶ 52 to which the government objects as noted below. The
 25 government recommends that defendant be sentenced to a term of 57
 26 months imprisonment, followed by a five-year period of supervised
 27 release, a \$300 special assessment, and restitution in the amount
 28 of \$913,325 as specified in the PSR.

1 II. SECTION 3553(a) ANALYSIS AND RESPONSE TO DEFENDANT'S
2 SENTENCING ARGUMENT

3 18 U.S.C. § 3553(a) identifies several factors that the
4 Court must consider in imposing a sentence, including the nature
5 and circumstances of the offenses and the need for just
6 punishment and to provide deterrence.

7 Here, the evidence at trial showed that defendant
8 orchestrated a scheme to purchase real estate by soliciting well-
9 known and admitted loan fraud expert Miriam Estrada to help him
10 fraudulently qualify for one loan, then find other properties
11 that defendant could similarly purchase with no money down and
12 where the sellers would pay him kickbacks to buy the property,
13 fully leveraged at full price. The evidence at trial further
14 showed that defendant intended to purchase as many properties as
15 there were sellers, followed by the corollary scheme that
16 defendant would buy other properties through straw borrowers that
17 defendant found and referred to Estrada for fraudulent loans.
18 While telling Estrada that defendant would cover the numerous
19 mortgages through rents collected from tenants, defendant instead
20 collected rents but failed to use the rent for mortgage
21 obligations; he simply kept the money to enrich and improve his
22 lifestyle, no less while he let the tenant-occupied properties
23 fall into disrepair as he committed one housing code violation
24 after another. Each of the properties with which defendant was
25 involved went into foreclosure shortly after close of escrow, and
26 losses caused by defendant's false statements totaled more than
27 \$900,000. Defendant was hardly the novice he has claimed to be;
28 he knew exactly what he needed to do to accomplish his fraudulent

1 goals, no less by telling lenders' underwriters that he was
2 engaged in a business that was, in fact, nonexistent, that he
3 earned substantial income therefrom, and that he spoke English.

4 Next, defendant's offense conduct was emblematic of the
5 greed that culminated in the mortgage market meltdown. Simply
6 put, the government believes that the Court must send a message
7 that offense conduct like defendant's will be severely punished.
8 Otherwise, future offenders will simply see such conduct as a
9 license to engage in fraud with little or no consequence or risk,
10 other than the loss of other people's money.

11 Next, defendant's request for a below-Guidelines sentence is
12 simply unreasonable. The Sentencing Guidelines calculation in
13 the PSR, to which defendant did not object,¹ yields an offense
14 level of 23 with a criminal history category of I. Defendant's
15 Guidelines range is 46-57 months. As the Supreme Court has
16 recently held, " . . . a district court should begin all
17 sentencing proceedings by correctly calculating the applicable
18 Guidelines range. . . . As a matter of administration and to
19 secure nationwide consistency, the Guidelines should be the
20 starting point and the initial benchmark." Gall v. United
21 States, 552 U.S. 38, 49 (2007). Accordingly, the Court is
22 required to take into account the Guidelines in connection with
23 determining a reasonable sentence.

24 As stated above, a sentence within the Guidelines,
25 specifically a sentence of 57 months, is reasonable and fully
26

27 ¹ "The defendant, through counsel, has no material
28 objections to the guideline computation of the PSR." Defendant's
Sentencing position, 3:21-22.

1 comports with the requirements of 18 U.S.C. § 3553(a) et seq.
2 Defendant's arguments to the contrary are simply unreasonable.
3 First, there is nothing in defendant's personal background that
4 would indicate that he has any special needs, skills, or
5 responsibilities beyond those of typical young adults. Next,
6 defendant's work and employment history is sporadic, at best, as
7 he was largely involved in real estate fraud for most of his
8 early work years.²

9 Finally, defendant's argument that he should receive a non-
10 custodial sentence due to alleged potential disparity with the
11 sentences of his co-defendants is without merit. 18 U.S.C.
12 § 3553(a)(6) requires that the Court shall consider "the need to
13 avoid unwarranted sentence disparities among defendants with
14 similar records who have been found guilty of similar conduct
15" Section 3553(a)(6) " . . . concerns national
16 disparities between defendants with similar criminal histories
17 convicted of similar criminal conduct—not disparities between
18 codefendants." United States v. Conatser, 514 F.3d 508, 521 (6th
19 Cir. 2008). "Disparities between the sentences of coconspirators
20 can exist for valid reasons, such as differences in criminal
21 histories, the offenses of conviction, or one conspirator's
22 decision to plead guilty and cooperate with the government."
23 Id., at 522, citing United States v. Dexta, 470 F.3d 612, 616 n.1

24
25 ² The government objects to PSR ¶ 52 as blatantly false.
26 Defendant falsely reported to the Probation Officer that he was
27 taken to the hospital after the police beat him up and used a
28 Taser stun gun on him twice during his arrest for the instant
offense. The government is prepared to call witnesses to rebut
these false accusations at a continued sentencing hearing if
necessary.

1 (6th Cir. 2006), cert denied, 127 S.Ct. 3066 (2007) (expressly
2 noting as "reasonable" the sentencing disparity between
3 cooperating and non-cooperating co-defendants). A defendant's
4 failure to accept responsibility³ and refusal to cooperate is a
5 valid reason for the Court to impose a different sentence over
6 that of another defendant convicted of the same conduct but who
7 pleaded guilty and cooperated. United States v. Stewart, 628
8 F.3d 246, 260 (6th Cir. 2010). The Ninth Circuit is in agreement
9 and has held that the disparity provision of Section 3553(a)(6)
10 has been complied with where a sentencing court imposes different
11 sentences between cooperators and non-cooperators. See, e.g.,
12 United States v. Carter, 560 F.3d 1107, 1121 (9th Cir. 2009).

13 Applying the foregoing authority to the present case, this
14 Court can and should impose a comparatively greater sentence on
15 defendant Banales over that of each of his co-defendants.
16 Defendant Banales chose to go to trial and was convicted of all
17 counts against him. His co-defendants each chose to plead guilty
18 early to one count of bank fraud; two agreed to cooperate and
19 actually testified against defendant Banales at his trial.
20 Unlike defendant Banales, each of defendant Banales's co-
21 defendants accepted responsibility and none of them at any time
22 claimed innocence, nor did any of them blame others for their
23 misconduct. Furthermore, none of defendant Banales's co-
24 defendants attempted to mislead the Court (or any trier of fact)

25
26 ³ A defendant who has chosen to go to trial and who
27 suffers a greater sentence over a similarly situated co-defendant
28 on account of it cannot later complain, as a violation of Section
3553(a)(6), that he was penalized for exercising his right to
trial. United States v. Sanchez Solis, 882 F.2d 693, 699 (2nd
Cir. 1989).

1 by claiming a language barrier⁴ or by claiming that he or she was
2 duped by his or her co-defendants into making the numerous false
3 statements at issue in the case.⁵

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12 ⁴ Defendant made his first appearance before Judge
13 Rosenberg on June 17, 2010. He was represented by counsel. He
14 was questioned extensively about whether he had read and received
15 the indictment, whether he understood his rights, and whether he
16 understood the terms and conditions of his pretrial release. The
17 entire colloquy was in English. Defendant did not seek the
18 services of an interpreter, nor did he once indicate that he did
19 not understand the proceeding or the English language. The
20 government has separately lodged with its sentencing position the
21 recording of that hearing. The government further notes that
22 defendant appears to operate at a far higher than average English
23 language level as, at least according to his sentencing exhibits,
24 he had a high grade point average in high school (in English),
25 and received certificates for nursing vocational training,
26 including courses in medical terminology and anatomy, in English.
27 See Exhibit C to defendant's Sentencing Position, filed February
28 26, 2010, docket no. 176.

21 ⁵ The Court should ignore, as irrelevant and improper, the
22 purported letter by a trial juror, attached as Exhibit A to
23 defendant's Sentencing Position. The jury convicted defendant;
24 the juror's post-conviction statement has no bearing on
25 sentencing, as juries are simply not legally empowered to
26 consider a defendant's sentence. Moreover, under Fed.R.Evid.
27 Rule 606(b), a juror "may not testify as to any matter or
28 statement occurring during the course of the jury's deliberations
or to the effect of anything upon that or any other juror's mind
or emotions as influencing the juror to assent to or dissent from
the verdict . . . or concerning the juror's mental processes in
connection therewith." Commonly and well-known by counsel as the
prohibition against a jury impeaching its own verdict,
defendant's counsel's flagrant violation of this rule serves no
purpose.

Accordingly, applicable law and the facts of this case permit the Court to impose a sentence within the Guidelines range. The government recommends that the Court impose a sentence of 57 months imprisonment, followed by a five-year period of supervised release, a \$300 special assessment, and restitution as provided in the PSR.

DATED: March 9, 2011

Respectfully submitted,

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Chief, Criminal Division

/s/
 MARK AVEIS
 EDWARD E. ALON
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 Attorneys for Plaintiff
 UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

I, **CAREY P. CRONIN**, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is the Office of the United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California, 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of

GOVERNMENT'S SENTENCING POSITION FOR DEFENDANT
JUAN BANALES VENEGAS

☒ Placed in a closed envelope, for collection and interoffice delivery addressed as follows:

☐ By hand deliver addressed as follows:

☐ By messenger as follows:

Luis A. Carrillo, Esq.
1525 Fair Oaks Avenue
South Pasadena, CA 91030

☒ Placed in a sealed envelope, for collection and mailing via United States Mail, addressed as follows:

☐ By facsimile as follows:

☐ By federal express as follows:

Coleen Ghaffari
United States Probation Officer
11827 Ventura Blvd.
Studio, City, CA 91604

This Certificate is executed on **March 9, 2011** at Los Angeles, California

I certify under penalty of perjury that the foregoing is true and correct


CAREY P. CRONIN